2013 IL App (3d) 130317-U

Order filed September 25, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

In re MARRIAGE OF MICHELE FERNANDES, Petitioner-Appellee, and MICHAEL E. FERNANDES, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, Appeal No. 3-13-0317 Circuit No. 04-D-585 Honorable Katherine Gorman, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Wright and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly considered the factors in section 602 of the Illinois Marriage and Dissolution of Marriage Act and did not err in terminating the joint parenting agreement and granting sole custody to the petitioner mother.

¶ 2 Petitioner, Michele Fernandes, filed a petition for modification of custody seeking to terminate the joint parenting agreement with respondent, Michael Fernandes. Following a full hearing on the matter, the trial court awarded sole custody of the parties' 15-year-old

son to Michele. Michael appeals, arguing that the custody determination was against the manifest weight of the evidence. We affirm.

¶ 3 Michele and Michael were married on September 12, 1992. During the marriage, they had two children: Haley, born February 6, 1994, and Cody, born May 19, 1997. The parties' marriage was dissolved in February of 2005 and a judgment was entered awarding the parties joint custody of their two children pursuant to the terms and conditions contained in a joint parenting agreement. In August 2009, Michele filed a petition to modify custody, seeking sole custody and alleging that the joint parenting agreement was no longer in the best interests of the children. Michael filed a response, asking the court to award him sole custody of the children and also seeking to terminate the joint parenting agreement.

¶ 4 Before the matter was set for trial, Michael's attorney filed a motion to withdraw and counsel was substituted. Thereafter, the trial was scheduled for March 1, 2011. On February 28, 2011, the trial court granted Michael a continuance, and the trial was rescheduled. Two months later, Michael's second attorney filed a motion for leave to withdraw. The trial court granted his request, and Michael hired another attorney. Michael's new attorney propounded interrogatories and requests to produce. Upon completion of discovery, the matter was set for trial on September 11, 2012. On July 13, 2012, Michael filed another motion to continue, which was granted. As a result, the cause was set for trial on November 19, 2012. On November 14, 2012, Michele filed a petition to continue. Michael did not object to the continuance, and the matter was reset for January 29, 2013.

¶ 5 At the custody hearing on January 29, the parties presented arguments and the trial

court reviewed the guardian *ad litem*'s reports.[1] The reports indicated that Haley was no longer a minor and Cody was 15 years old. The guardian *ad litem* stated that both parents were loving parents, but they did not communicate well and had difficulty agreeing on "even the simplest issues." She noted that both parents were good parents, but that Cody had a strong preference to live with Michele. Cody considered Michele's house his home. He told the guardian *ad litem* that he did not like the joint parenting arrangement and he felt like he lived "out of a suitcase." The guardian *ad litem* stated that she believed the joint custody agreement should be terminated because it was not in Cody's best interests. She recommended that the trial court terminate joint custody and award sole custody to Michele.

¶ 6 Following arguments by both parties, the trial court recited the facts as they pertained to the statutory factors. The trial court carefully considered the wishes of the parents, noting that both parents wanted custody. The court also noted that Cody wished to live with his mother and that he wanted the joint parenting agreement to end. The court stated that it gave great deference to Cody's strong desire to live with Michele, as well as the guardian *ad litem*'s recommendations. The court also took judicial notice of an order of protection from January 2, 2009, involving Michele's husband, Scott Furlong. The court noted, however, that Furlong testified at the custody hearing that he had addressed his anger issues and the guardant *ad litem* reported that Cody did not have any problems with him. Therefore, the court was satisfied that any physical violence had been addressed. Finally, the court emphasized that neither parent facilitated a cooperative attitude toward the other parent. The

[1] Although it is apparent that a custody hearing was conducted, at which witnesses were presented, a transcript of the hearing has not been included in the record on appeal.

trial court agreed with the guardian *ad litem*'s recommendation to terminate the joint parenting agreement and awarded sole custody to Michele.

¶ 7 I. Custody

¶ 8 On appeal, Michael argues that the trial court erred in granting sole custody to Michele in that the court failed to properly consider the factors listed in section 602 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602 (West 2012)).

¶ 9 We will not disturb a custody determination unless it is against the manifest weight of the evidence. *In re Marriage of Ricketts*, 329 Ill. App. 3d 173 (2002). "A judgment is against the manifest weight of the evidence when the opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based upon the evidence." *Id*. at 181-82. In determining custody, the primary consideration is the best interests and welfare of the child involved. *Prince v. Herrera*, 261 Ill. App. 3d 606 (1994). In determining the best interests of the child, the trial court is to consider all relevant factors under section 602 of the Act, including:

"(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community;

(5) the mental and physical health of all individuals involved;

(6) the physical violence or threat of physical violence by the child's potential custodian,

whether directed against the child or directed against another person;

(7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person;

(8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; [and]

(9) whether one of the parents is a sex offender[.]" 750 ILCS 5/602(a) (West 2012).

¶ 10 It is well settled in custody cases that there is a strong and compelling presumption in favor of the result reached by the trial court. *In re Marriage of Willis*, 234 Ill. App. 3d 156 (1992). The trial court's custody determination is afforded "great deference" because the trial court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child. *In re Marriage of Gustavson*, 247 Ill. App. 3d 797 (1993).

¶ 11 In this case, the trial court's determination to award sole custody to Michele was not against the manifest weight of the evidence. Initially, we note that Michael makes several assertions that are not contained in the record. On appeal, we must determine whether the trial court's ruling was against the manifest weight of the evidence. In doing so, we may not rely on facts introduced by way of improper filings or statements contained in Michael's brief that are based on matters outside the record on appeal. See *Frisch Contracting Service Co. v. Personnel Protection, Inc.*, 158 Ill. App. 3d 218 (1987) (appellate court cannot consider matters outside the record on appeal).

¶ 12 A review of the record reflects that the trial court properly considered the statutory

factors enumerated in section 602 of the Act. Specifically, the trial court's statement at the conclusion of the custody hearing shows that it considered Cody's statement regarding his desire to live with Michele, Cody's relationship with both Michael and Michele and their extended families, and Cody's interaction with Michele's husband. See 750 ILCS 5/602(a)(1), (3) (West 2012). The court noted that most of the statutory factors had no relevance or were balanced in favor of neither party. It stated that both parties loved and cared for Cody, and both were committed to meeting his needs. However, the court noted that Michael and Michele had difficulty interacting with each other. Finally, the trial court adopted the guardian *ad litem*'s finding that custody should be awarded to petitioner based on Cody's age and his strong desire to live with his mother. See 650 ILCS 5/602(a)(2) (West 2012).

¶ 13 In sum, the trial court's decision reflects that the court considered the evidence and afforded significant weight to Cody's wishes and the guardian *ad litem*'s reports, in which she concluded that Michele should be awarded sole custody. Because the trial court was in the better position to evaluate the evidence and the credibility of the witnesses, we are unable to say that its decision was against the manifest weight of the evidence.

¶ 14 II. Speedy Trial & Ineffective Assistance of Counsel

¶ 15 Michael also claims that he was denied a fair and speedy trial and that his trial counsel was ineffective.

¶ 16 A defendant in a criminal case is entitled to a speedy trial pursuant to the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5 (West 2012)). However, no such provision exists as to civil cases, and respondent has failed to cite any authority in support of his

argument that the right to a speedy trial should be enforced in civil proceedings. See *Elder v. Bryant*, 324 Ill. App. 3d 526 (2001) (arguments without supporting authority are forfeited). Even if respondent was entitled to a speedy custody hearing, we note that any significant delay was caused by respondent himself. Michael employed three different attorneys and requested continuances on at least two occasions. He was not denied a fair trial.

¶ 17 Michael's ineffective assistance of counsel argument is equally unavailing. In *Kalabogias v. Georgou*, 254 Ill. App. 3d 740 (1993), the court observed that "[w]hile the right to the effective assistance of counsel is firmly grounded in our criminal jurisprudence [citation], no such right exists on the civil side." *Id*. at 750 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)); see also *People v. One 1999 Lexus*, 367 Ill. App. 3d 687, 693 (2006) (because a forfeiture action is civil, it is doubtful that a claim of ineffective assistance of counsel would be viable). A claim that counsel is ineffective is based on a statutory right to counsel. *In re J.C.*, 163 Ill. App. 3d 877, 891 (1987) (while juvenile proceedings are civil in nature, a juvenile's right to counsel is provided by statute and implicit in that right is that counsel's representation be effective). The custody petition in this case is civil in nature, and Michael does not have a statutory right to counsel. Thus, his claim of ineffective assistance has no merit.

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Peoria County is affirmed.

¶ 20 Affirmed.